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Carlos Santiago Nino*

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Carlos Santiago Nino

Abstract

This article explores the wave of democratization that swept through Latin America during the 1980s. The article addresses attempts at political reform in Bolivia, Brazil and Chile. It specifically explores the attempts at political reform in Argentina and focuses on the power of the Argentine presidency as well as efforts at constitutional reform. It examines the broad constitutional powers given to the Argentine President and delineates how hyper-presidentialism has contributed to the expansion of presidential authority. The benefits of a parliamentary system are discussed as well as the difficulties in maintaining democracy under a purely presidential system. Finally the article examines the dangers of adopting a purely parliamentary system within Latin American countries accustomed to strong presidential systems and considers the adoption of a mixed parliamentary system. The article promotes the adoption of a system in which there is a separation of the Head of State from the head of the government, parliamentary participation in the formation of government, and electoral participation in the formation of the Executive.

ESSAY

THE DEBATE OVER CONSTITUTIONAL REFORM IN LATIN AMERICA*

*Carlos Santiago Nino ***

A wave of democratization swept Latin America during the 1980s. Unprecedented interest in reforming government institutions followed the democratization in order to consolidate the new, weak democracies.¹ Interest in institutional reform may be attributed, at least in part, to two factors. Initially, this interest in reform attempted to overcome an undervaluation, based upon a vulgarized form of Marxism, of the impact of institutional structures on social forces. Additionally, one may attribute the reform to the weakness of existing governmental institutions that became more evident in the new democracies than in the prior governments.

Concern for institutional reform is natural because this wave of democratization, unlike previous ones, is expanding despite a hostile environment. The countries undergoing democratization face severe economic crises. When a country enjoys economic prosperity, almost any system of government seems functional, as evidenced by the enormous variety of governments in Western Europe: constitutional monarchies and republics; federal and unitary organizations; parliamentary, semi-parliamentary, and semi-presidential regimes; two-party and multi-party systems; proportional representation or winner-take-all districts; etc. When there are massive social demands creating constant pressure upon the political system, with little possibility of satisfying them, it is crucial to determine which system best resists that pressure at the lowest cost to legitimacy, while preserving maximum stability.

Institutional change has taken shape through important

* This Essay has been translated from the original Spanish by Michael E. Roll of the *Fordham International Law Journal*.

** Professor of Law, University of Buenos Aires, Argentina. Professor Nino was also a close advisor to former President Alfonsín.

1. See *Trends: Growing Demand for Change of Course*, *LATIN AM. WKLY. REP.*, WR-92-32, Aug. 20, 1992, at 6-7 (discussing several countries' reasons for recent clamor for reform).

reforms such as those undertaken by Brazil in 1988² and by Colombia in 1990.³ These reforms deserve attention because, aside from introducing new institutional mechanisms, they represent aspirations of a social constitutionalism to respond to the principal threat to Latin American democracies: the discontent of the people over the inability of the government to satisfy their basic needs.

These reforms, however, do not reflect movements that have been growing for various years in Chile, Brazil, Venezuela, Peru, Bolivia, Argentina, and Uruguay, movements pushing for profound transformation of the traditional institutions of government in Latin America. These ambitious movements focus upon reform of a dominant institution in the Americas: the presidency. The presidency is also a peculiarly Latin American institution.⁴

Although I was involved in the Bolivian and, to some degree, in the discussions concerning the Brazilian and Chilean reform movements, shortness of space forces me to limit my discussion to the case of my country, Argentina. Rather than recount the specific debates on the reform movement in Argentina, I will describe the position I took in the debate. In other South American countries, there was an interesting movement to reform the Chilean Constitution early in the process of democratization, including a debate over the adoption of a pure parliamentary system. The Chilean movement, however, now seems to have lost force.⁵ In Brazil, the current constitution provides for a referendum in the current year 1993 on the type of state and design of government.⁶ In Venezuela, constitutional reform is heavily debated in light of the public

2. See Colombia: *Constituent Polls Approved by Court*, *LATIN AM. WKLY. REP.*, WR-90-41, Oct. 25, 1990, at 2-3 (discussing dissension over whether Court had power to approve such an assembly for reform).

3. See Colombia: *Reform Referendum Widely Criticised*, *LATIN AM. WKLY. REP.*, WR-89-47, Nov. 30, 1989, at 10-11 (proposing that reforms grant too many powers to president, including robbing the court of power of judicial review).

4. See generally Fred W. Riggs, *The Survival of Presidentialism in America: Para-constitutional Practices*, 9 *INT'L POL. SCI. REV.* 247, 248-50 (1988) (emphasizing differences between U.S. and Latin American presidential systems).

5. Chile: *Inside View of the Reform Package*, *LATIN AM. WKLY. REP.*, WR-92-23, June 18, 1992, at 5. This states that a healthy skepticism remains on the chances of success of approximately 30 constitutional reforms passing, one of which is to empower the president to remove the commanders-in-chief of the armed forces. *Id.*

6. NOVA CONSTITUÇÃO BRASILEIRA, tit. 9, art. 2.

confidence crisis faced by the current government.⁷ In Peru, the Fujimori government called a constitutional convention with the alleged aim of improving institutions after the authoritarian steps taken by the present regime.⁸ In Uruguay, reform proposals on institutional organization have been presented.⁹ In Bolivia, the first step in the process of reforming the Constitution in significant respects—though in a direction less parliamentary than originally intended—was completed in April 1993.

Returning to Argentina, there has been continuous public debate on constitutional reform. In March 1986, President Raul Alfonsín asked his advisory body on structural reform, the Council for the Consolidation of Democracy, to study constitutional reform. Through the work of technical commissions and after consulting ample sectors of society, the Council produced two opinions favoring constitutional reform, one in October 1986 and one in August 1987.¹⁰

The Alfonsín government held face-to-face talks with the opposition on the content of constitutional reform. These conversations led to a joint declaration in January 1988 by President Alfonsín and Governor Antonio Cafiero, head of the principal opposition party, the Peronists, on the general orientation of reform.¹¹ Toward the end of 1988, there were meetings between the two principal candidates of the 1989 presidential elections—Governor Carlos Menem for the Peronists and Governor Eduardo Angeloz for the Radicals. Although

7. *Venezuela: Assessing Pérez's First 100 Days*, LATIN AM. WKLY. REP., WR-89-19, May 19, 1989, at 10. Venezuela's condition in 1989 was called "the most severe crisis faced by any president in the 31 years since the country restored democratic rule." *Id.*

8. *See generally Peru: Conflicts of Power Start Looming*, LATIN AM. WKLY. REP., WR-91-49, Dec. 19, 1991, at 3 (discussing tortured relations between President Fujimori and Peruvian Congress).

9. *But see Uruguay: Lacalle Prepares Midterm Reshuffle*, LATIN AM. WKLY. REP., WR-93-01, Jan. 7, 1993, at 11 (calling recent problems attributable to individuals and thus not resolvable through either presidentialist or parliamentary changes).

10. I coordinated the Council for the Consolidation of Democracy from its creation in 1985 until its dissipation in 1989. *See* Carlos S. Nino, *Transition to Democracy, Corporatism and Constitutional Reform in Latin America*, 44 U. MIAMI L. REV. 129, 163 (1989) (discussing reform movements in Latin American countries).

11. *Alfonsín and Opposition Chief Agree on Constitutional Reform*, Reuters, Jan. 14, 1988, available in LEXIS, Nexis Library, CURRNT File (stating that these leaders of opposing parties agreed on the need to reform the constitution).

the two candidates reached oral agreement on reform, no joint action materialized due to the ongoing electoral campaign.¹²

Shortly after assuming power in 1989, and increasingly during his administration, President Menem and numerous government officials demonstrated unequivocal interest in constitutional reform, primarily to permit re-election of the president. Also, the Peronist party approved a document recommending constitutional reform that focuses upon the organization of power.

A fallacy of "undue abstraction," however, causes considerable confusion in the Argentine debate over constitutional reform. Alternatives were presented in terms of "favoring" or "rejecting" reform itself, without clarifying whether a particular reform is favored or rejected. In other words, an incorrect impression of popular consensus is given because the issue is described in abstract form; for some politicians, no reform is better than the specific reform proposed by opposition members.

When the Alfonsín government asked the Council for the Consolidation of Democracy to study the possibility of constitutional reform,¹³ it expressly excluded modification of Mr. Alfonsín's presidential mandate, including modification of the prohibition on re-election. Avoiding the issue of modification of the prohibition on re-election permitted the debate to focus upon issues of great institutional importance.

Under President Menem, by contrast, it is clear that the central issue of constitutional reform is the re-election of President Menem. The re-election issue results in a resistance to debate on the necessity of reform. Additional reform proposals, the majority of which coincide with those introduced by decree by the military government in 1972, acquire a pretextual character.¹⁴ Although these proposals could be debated

12. See *Argentina Halts Constitution Reform*, *FIN. TIMES*, Sept. 30, 1988, at 4 (stating that constitutional reform had sunk on both candidates' list of priorities).

13. See *Argentina: Alfonsín Assesses Elections, Suspends Constitutional Changes*, BBC, Summary of World Broadcasts, Sept. 22, 1987, available in LEXIS, Nexis Library, CURRNT File (showing how President Alfonsín distanced himself personally from any changes recommended, and suspended the changes recommended until a majority referendum could be achieved on them).

14. These positions included shortening the term of the president to four years, direct election of the president and senators, shortening the term of senators, and inclusion of an additional senator for the majority party.

in the context of comprehensive reform, no one seriously believes that they are important enough per se to justify a constitutional convention and its risks.

What are the risks of a constitutional convention? The principal risk is the production of a profound division in society and the exclusion of important sectors of society. Excluded sectors may question the legitimacy of the convention or the fairness of the reformed system. Exclusionary reform has already occurred in Argentina on various occasions. The Constitutions of 1819 and 1826 excluded the Federalists.¹⁵ This century, the Constitution of 1949 excluded opponents of Peronism.¹⁶ Subsequently, however, the constitutional convention reforms of 1957 in turn excluded the Peronists.¹⁷

A constitution, then, must be the result of broad consensus; it must be seen as a constitution for all Argentines, not as the constitution for a particular party. A plebiscite on a particular constitutional reform, announced each time the Menem government fails to reach an agreement with the opposition Radical party, also carries considerable risk: the population is presented with the alternatives of "favoring" or "rejecting" constitutional reform, which is not sensible, or it is presented with the specific content of a reform, which carries the risk of radically dividing society. Additionally, there are risks that the constitutional convention will improperly assume powers that do not correspond to any other body in a constitutional system, and that a relative and narrow majority will undermine constitutional practice developed over the course of a century-and-a-half. The Menem government's court-packing increases these risks because there are doubts over the impartiality of the Supreme Court, the highest body of government in charge of controlling the constitutionality of all constitutional conventions.¹⁸ Given the serious risks, a constitutional convention is

15. See DAVID ROCK, *ARGENTINA 1516-1987: FROM SPANISH COLONIZATION TO ALFONSÍN* 92-93 (1988) (explaining how constitution affronted Federalists).

16. *Id.* at 306 (stating how Perón used his powers under constitution to create "a state of internal war" with opponents).

17. See *id.* at 333-37 (describing how Peronists were excluded from Argentine government). New penalties were imposed on Peronists after the Constitution of 1949 was abolished in May, 1956. *Id.* at 335; see Nino, *supra* note 10, at 162 (describing proscription of Peronist party).

18. See *Argentina: Menem Targets the Supreme Court*, *LATIN AM. WKLY. REP.*, WR-89-40, Oct. 12, 1989, at 2-3 (describing motivations and reactions to Menem's court-

justified only when reform results from a diagnosis that the existing constitutional structure is dysfunctional, and that the dysfunctionality affects consolidation of democracy as well as the preservation and promotion of basic human rights.

The project proposed by the Council for the Consolidation of Democracy during the previous government was the result of such diagnosis.¹⁹ An important factor of Argentine institutional weakness, though certainly not the only one, was the formation of a hyper-atrophied presidency throughout Argentine history.²⁰ To this extent, there is substantial similarity between the evolution of Argentine constitutional practice and that of the majority of Latin American countries.

As shown in an investigation by the Center for Institutional Studies, Argentine hyper-presidentialism is partly the result of Argentine constitutional provisions designed by Juan Bautista Alberdi, the intellectual father of the Argentine Constitution.²¹ Argentine constitutional provisions differ from U.S. constitutional provisions on significant issues.²² They do not require the president to seek the advice and consent of the Senate in selecting his Cabinet, a typical parliamentary mechanism incorporated into the U.S. Constitution.²³ Unlike the U.S. Constitution, the Argentine Constitution gives the president various powers in the event of a state of siege.²⁴ Similarly, the Argentine Constitution gives the president powers regarding federal intervention where the U.S. Constitution

packing plan); *Argentina: Justice Minister Resigns Over Row*, *LATIN AM. WKLY. REP.*, WR-89-41, Oct. 19, 1989, at 11 (same).

19. See Nino, *supra* note 10, at 163-64 (discussing proposals of this Council).

20. THOMAS E. WEIL ET AL., *AREA HANDBOOK FOR ARGENTINA* 185 (1974) [hereinafter *AREA HANDBOOK*]. "Theoretically, the [Argentine] government has been based on the executive, legislative, and judicial branches but, in fact, the executive branch has dominated Argentina's government and society at large." *Id.*

21. See *id.* at 186; see also ROCK, *supra* note 15, at 123-24 (discussing powers of executive branch and how they were based on Alberdi's tract *Les Bases*).

22. See *AREA HANDBOOK*, *supra* note 20, at 185-90. Significant differences include the Argentine powers to declare a state of siege, suspend civil liberties guaranteed under the constitution, appointment of cabinet and federal judiciary personnel, and the ability to introduce legislation. See *infra* note 24 and accompanying text (discussing state of siege powers). The Argentine system also provides for an electoral system based upon direct voting. *AREA HANDBOOK*, *supra* note 20, at 192.

23. See *AREA HANDBOOK*, *supra* note 20, at 187 (discussing the lack of provision for advice and consent).

24. See *id.* at 187-88. The president has the power to declare a state of siege as well as the power to suspend most constitutionally guaranteed civil liberties. *Id.*

does not.²⁵ Hyper-presidentialism also results from the practices of successive executives who enlarged their powers at the expense of a resigned Congress, and with the blessing of the Supreme Court.²⁶

The expansive practice of the exercise of power by the executive, at the expense of federal and even provincial powers, has contributed further to the formation of hyper-presidentialism. Several methods illustrate this consolidation. The president can delegate legislative power or promulgate "necessity" and "urgency" decrees, of which extreme use has been made lately.²⁷ The president can also create powerful agencies. The president can abuse its veto power, especially a partial veto, as a weapon to reformulate laws. Weakening of administrative controls also allows presidential influence in legislative areas, and is portrayed by the Menem government's removal of the Attorney General, various government prosecutors, and almost all the members of the Court of Government Accounts. Furthermore, the president is empowered to interfere with the process of approving the budget and investments, and pardon those accused but not yet convicted of crimes, especially those accused of human rights violations. These mechanisms, together with the abuse of the state of siege and federal intervention, have enormously expanded the presidency.²⁸

According to many influential political scientists, Argentine hyper-presidentialism has aggravated dysfunctionalities associated with presidential systems.²⁹ No president since 1928 has completed his term under the Constitution of 1853. Moreover, it is clear to any impartial observer that the crisis faced by Isabel Perón in 1976, which ended in a military over-

25. *See id.* at 185, 187 (commenting that provincial and local government is limited by federal government intervention).

26. *See id.* at 190. "Although the Supreme Court has declared legislation or acts of the executive branch to be constitutional, the practice of judicial review is not carried out as extensively as in the United States." *Id.*

27. Don Podesta, *South America's Trickle-Down Democracy; Elected Rulers Find Ways to Impose Programs over Faction Ridden Legislatures*, WASH. POST, Aug. 9, 1992, at A28 (describing how Menem has used over 100 such decrees during the first three years of his presidency, while Alfonsín had used only eight while in office for five and one-half years).

28. *See generally* AREA HANDBOOK, *supra* note 20, at 185-90.

29. *See generally* Nino, *supra* note 10, at 162 (listing additional powers enjoyed by Argentine president not enjoyed by U.S. president).

throw,³⁰ or by Raul Alfonsín in 1989, that compelled Alfonsín's resignation,³¹ could have been resolved differently in the framework of a parliamentary or mixed-parliamentary form of government. A parliamentary framework would have facilitated a less traumatic transition through the resignation of the government and its replacement by another. Today, the rigidity of presidentialism is shown fully in the crises faced by countries such as Peru, Venezuela, and Brazil, the last of which has had finally a successful, though difficult, resolution.³²

Political scientists agree that parliamentary democracies are much more stable statistically than presidential forms of government, even under enormously difficult conditions, as shown by the case of India.³³ Presidential forms of government exist only in the United States, which introduced the form of government, in Latin America, and in some Asian and African countries. Except for the United States, there is no economically developed democratic country that has a presidential form of government.

Political scientists, however, have gone beyond statistical valuations. While recognizing that a form of government is never the sole nor most important cause of crisis and failure of democracy, political scientists have formulated principles to explain why democracies are more fragile under pure presidential systems. Other causes of crisis and failure of democracy frequently mentioned include (i) abuse of authority permitted by the lack of adequate parliamentary control on the executive; (ii) diminished representation caused by lack of minority participation in formation of governments and the rigidity of the system in adapting to changes in societal consensus; (iii) lack of escape valves during times of crisis; (iv) dynamic confrontation between political parties created by presidentialism's zero-sum game (especially when the parties are disci-

30. See *id.* at 153 (discussing Isabel Perón's crises).

31. See generally *id.* at 163 (commenting on circumstances surrounding Alfonsín's resignation).

32. See, e.g., Peru: *Conflicts of Power Start Looming*, LATIN AM. WKLY. REP., WR-91-49, Dec. 19, 1991, at 3 (discussing tortured relations between President Fujimori and Peruvian Congress).

33. See, e.g., Riggs, *supra* note 4, at 248-50 (discussing how other countries that followed a parliamentary system modeled after France or Britain, such as India, have avoided troubles plaguing those that have adopted a presidentialist constitution, such as Korea, South Vietnam, Liberia, and other Latin American countries).

plined, which increases gridlock among the branches of government when they are held by different political parties); (v) difficulty forming broad multi-party consensus and coalitions; and (vi) personalization of power, where the faults of a particular president cause resentment of government institutions.³⁴

As a result of hyper-presidentialism, there are situations where Argentina, like many other Latin American countries, has a president with enormous formal powers, but who has lost popular support and is stuck in a dynamic confrontation with opposition parties. The lack of an institutional resolution of the situation creates power vacuums that are filled by corporate groups such as the military, the business sector, the unions, and the Church. In exchange for conditional support of the president, these groups take advantage of the situation to obtain sectorial advantages, or they change the situation through extra-constitutional methods.

When these causes are further developed, they seem sufficient to explain statistical data that show scarce stability in presidential systems of government, especially when the systems have organic political parties and proportional representation systems. The dysfunctionalities become increasingly potent in a hyper-presidential system like the Argentine one.

In a presidential system that is carefully calibrated, like that of the United States, the dysfunctionalities are less problematic. Apart from the case of Mexico, the current system in Argentina is possibly the most extreme form of presidentialism in the world, placing it in line with semi-authoritarian systems.

Nonetheless, recognition of the defects of presidentialism does not necessarily imply that a pure parliamentary system is better for Latin American countries. Many objections are usually made to parliamentary systems; most are incorrect because they do not account for the variety of parliamentary systems. The objections tend to focus on the systems of the Third and Fourth French Republics or the current Italian system, without considering others such as those of Germany or Portugal. The

34. See *id.* at 256-59 (explaining how the United States has avoided such problems by maintaining an appropriate balance of aggressive/passive, or imperial/complaisant qualities in presidential temperament that other countries have not been able to attain). Highly personal regimes must often resort to violence to sustain their legitimacy. *Id.* at 274 n.11.

principal objection against the parliamentary system is that it implies government instability.

The response to this argument is twofold. First, one must consider the extent to which governmental instability is undesirable. One should consider whether governmental instability helps maintain the overall stability of the system of government, and whether it promotes the perpetual existence of a governing class which, as in the case of Italy, favors development of the country. It should also be noted that government instability in some parliamentary systems has resulted in the creation of a solid continuous public administration. Second, there are mechanisms that parliamentary system countries, such as Germany and Spain, have adopted that are very effective in avoiding governmental instability. Constructive censure is one such mechanism. While censure in those countries, as well as in Great Britain, has been scarce, the possibility of censure accounts for those systems not having the dysfunctions of presidentialism.

A pure parliamentary system has other disadvantages. One disadvantage of a pure parliamentary system is that it hinders adoption of defined policies when there is a stalemate among diverse political forces, forcing the government into paralysis. The paralysis is aggravated when, as in the case of Israel, there are political groups that have scarce electoral support but are necessary to the formation of a government; minority parties can blackmail majority parties to adopt minority policies. Also, indirect election of the executive may create a societal feeling of alienation from the government and a perception that there is a perpetual political class in power. Parliament is not always a loyal intermediary between the electorate and the government.

Another disadvantage is that a president that is a head of state, but without governing power, might not be accepted easily in societies accustomed to strong presidents, such as those of Latin America. There will be pressure to increase the president's powers and the pressure may be taken advantage of and used by the president, as occurred in Brazil. When Brazil adopted a parliamentary form of government, the military did not want Joao Goulart to have plenary power when he replaced Janio Quadros as the head of state. In response, President Goulart successfully mobilized society to reform the constitu-

tion and re-establish a presidential system of government. The military staged a coup d'état in 1964.³⁵

Recognition of the disadvantages of pure parliamentarism leads one to consider adoption of a mixed form of government, as urged by various sectors in Italy and Israel. Of course, one must analyze the attributes of a mixed "semi-presidential" or "semi-parliamentary" system. Certainly, there is a great variety of mixed regimes, as observed in France, Portugal, Finland, Austria, and Iceland. As well, there are a variety of other reforms under consideration in other countries, such as the one presented to the Israeli Parliament by a commission of law professors from the University of Tel Aviv.

To test the merits of these systems, it is first necessary to put aside labels and analyze the mechanisms that allow these systems to overcome the difficulties of the pure presidential and parliamentary systems. Otherwise, Juan Linz warns that one runs the risk of adopting a system that combines, rather than eliminates, the defects.³⁶

In Argentina, there has been much confusion that a mixed system is created by the existence of a prime minister or, as one sector of Peronism proposes, a coordinating minister. This is a mistake: such a figure may exist, as in Peru, but the system nonetheless continues as a pure presidential system. In Peru, the prime minister, known by few, did not play any relevant role in the crisis caused by the closure of Parliament ordered by President Alberto Fujimori. Whether the nomination and removal of the prime minister or coordinating minister depends entirely on the president, or whether (even with the possibility of parliamentary censure) the functions of the prime minister are not those of head of state but depend fundamentally upon the delegation by the president, the introduction of this organ of government does not fundamentally alter the nature of the presidential system nor serve to overcome its difficulties.

35. See Nino, *supra* note 10, at 159 (describing how such increase in power sometimes invites retaliation, and hence, instability).

36. See generally Juan J. Linz, *Democracia Presidencial o Parlamentaria, Hay Alguna Diferencia?*, PARA LA CONSOLIDACION DE LA DEMOCRACIA, PRESIDENCIALISMO VS. PARLAMENTARISMO: MATERIALES PARA EL ESTUDIO DE LA REFORMA CONSTITUTIONAL 19, 26 (1988).

Existence of a genuine mixed system of government occurs under the following conditions.

A. Separation of the Head of State from the Head of Government

This is a substantial element for neutralizing the various defects of presidential systems such as abuse and personalization of power, as well as for relaxing the rigidity of the system that weakens representation and stability by not offering appropriate "escape valves."

The separation of the head of state and the head of government is one of the most delicate aspects of a mixed system of government. If the two powers are not clearly distinguished, or if they are superimposed, as with the powers of defense and foreign affairs in the French system, there is a risk of serious conflict between the two holders of power. Also, if the power of the head of government is blurred with only subordinate powers given to the head of government, such as being head of public administration, or powers are granted to the head of government by the head of state, the system will not overcome the difficulties and defects of the presidential system.

For a mixed system to function, especially in the political conditions of Latin America, the separation of both positions should be clear. The head of state must represent unity of the country and continuity of democratic institutions, be above partisan division, represent the country abroad, and open sessions of Congress. The head of state could nominate candidates for permanent government positions, such as judges. It is also possible to grant him powers to be exercised in times of crisis such as those of declaring states of siege or federal intervention. Other powers of the head of state might include the power to dissolve Parliament and call new elections. The head of state might have some veto power over legislation or presenting requests of judicial review of the constitutionality of legislation to the Supreme Court. Naturally, he should have the highest degree of protocol of the country.

Government powers exercised daily should be granted to the head of government. He should be able to set state policy and to name a cabinet, appear periodically before Congress to debate and to defend his policies, introduce and veto legisla-

tion, and be commander-in-chief of the armed forces. Finally, he should control public agencies.

Under the current Argentine constitutional structure, Article 86 inferentially gives the president four leadership positions: leader of the country, the public administration, the Federal District, and the armed forces.³⁷ A new governmental system, therefore, would imply that the executive should be divided between a head of state and a head of government, where the head of government would have power over public administration and the armed forces. Power over the Federal District should be replaced by a popularly elected governor.

It should be noted that division of executive power is not dependent upon the label attributed to each head. The head of state could be called "President of the Republic/Nation," as in France or Portugal, and the head of government could be called "Prime Minister" or "Coordinating Minister." However, given the association people make between government and president, it may be wise to name the head of government "President" or "President of the Council of Ministers," as in Spain or Italy, and to call the other official simply "Head of State."

B. Parliamentary Participation in the Formation of Government

Parliamentary participation in the formation of government is decisive in overcoming the difficulties of presidentialism. It is also common to all mixed and parliamentary systems. If Parliament does not participate in the formation of a government, it is not possible to overcome the abuse of power associated with presidentialism. Nor is it possible to attenuate the dynamic confrontation among political parties; nor to increase representation; nor is it easy to form multipartisan coalitions; nor does it include escape valves to confront political crises.

Parliamentary participation in the formation of a government establishes the notion that the government is responsible to Parliament. Responsibility to Parliament includes accounting for the government's acts and submitting itself to the controls established by Parliament.

Participation in the formation of government may occur

37. See CONSTITUCIÓN ARGENTINA [Constitution] art. 86.

through diverse methods. One method is through the requirement of a vote of confidence for the head of government and his cabinet to assume power. Or, participation may consist only of the possibility of censure through varying majorities, from simple to super to absolute. Censure may also be constructive where it is impossible to topple a government without the formation of a new government by a majority.

A vote of confidence prior to government formation might be required where the head of government has limited popular legitimacy. Constructive censure might be employed here by requiring an absolute majority to carry a censure motion forward. Requirement of a larger majority might result in the censure mechanism becoming inoperative and creating more of a true political trial.

Censure should be accompanied by the power of the head of state or government to dissolve the House of Deputies and call new elections. Many times it is wrongly thought that introduction of this element goes too far toward parliamentarism. Without this power, there is no countervailing power to censure which might be exercised irresponsibly as occurred toward the end of the last century and beginning of this century in the parliamentary system of Chile.

C. Electoral Participation in the Formation of the Executive

Just as the mixed system takes the prior two elements from parliamentarism, it takes electoral participation in the constitution of the executive from presidentialism. Electoral participation neutralizes the disadvantages of parliamentarism related to the possibility of stalemates and excessive intercession in the confirmation of the executive.

While mixed systems are characterized by electoral participation, they differ greatly on the role of elections in the formation of the executive. It is clearly disadvantageous for both the head of state and head of government to be elected by popular vote. Popular election of both could increase conflicts between the two executives because each could allege legitimacy derived from the people. The head of state might assert that he was elected by a larger majority and the head of government would assert he was elected by a more recent majority that more accurately reflects popular sentiment. For these rea-

sons, actual or projected mixed systems only permit the head of state or the head of government to be popularly elected, but not both.

1. Current Mixed Systems

Popular election of the head of state has been adopted by current mixed systems such as those in France and Portugal. Popular election of the head of state is consistent with the head of state retaining powers of government not shared with others, as in France. Retention of power, however, is undesirable because of the superimposition of the powers of the head of government because all areas of government are interconnected. When the head of state does not exercise power independently, there may be tension between the legitimacy he enjoys if popularly elected, and the limits on his powers. In a similar sense, there may be tension between the lack of direct popular legitimacy of the head of government and the breadth of his powers.

The possible tension between the legitimacy of the head of state and his lack of powers of government, however, has not created difficulties in mixed systems because the head of state, while not governing directly, has the power to designate the head of government, with or without a vote of confidence by Parliament. This aspect permits the creation of a dynamic mixed system of government characterized by the following phases.

First, the head of state enjoys legitimacy by virtue of his direct election. While the head of state may not govern directly, he may govern effectively through the head of government he designates; given his direct election by the people, it will not be easy for Parliament to censure the government. Even if the threat of censure exists, the head of state may utilize his power to dissolve Parliament and call new elections.

Second, the head of state may lose popular support, as occurred in France when François Mitterand had to accept cohabitation with Jacques Chirac.³⁸ During the second phase,

38. See William Drozdiak, *French Socialist Calls For 'Big Bang' Revival of Party as Voters Turn Away*, WASH. POST, Feb. 26, 1993, at A28 (commenting on the weakening aspects of cohabitation). "Cohabitation" describes the situation that first occurred in 1986, when Mitterand, the Socialist President, was forced to name the conservative

the president has no option but to negotiate with the opposition the designation of a head of government that will necessarily adopt independent policies, especially if, unlike France, he holds all the powers of government. The head of state should limit himself to representing the unity of the country without becoming involved in day-to-day politics.

2. Toward a New Mixed System

A mixed system where the head of government is elected, rather than the head of state, does not create the tension between legitimacy and limited government power. The head of government would have popular support while the head of state should be designated indirectly through Parliament. Generally, a supermajority in both houses of Congress would be required to assure that the choice of head of state is nonpartisan. However, the tension created in this mixed system is between popular will and parliamentary formation of a government. The tension may be resolved by requiring majority election of the head of government and a vote of confidence, and by varying the majority necessary for censure. For example, if the head of government were elected by a broad popular majority, it would not be necessary to obtain a parliamentary vote of confidence and censure would only be allowed by a supermajority vote. On the other hand, if the head of government were elected by a narrow majority, or even by a plurality, a vote of confidence should be required and censure should be easier to obtain.

In this second mixed system model, the head of state should not participate in the designation of the head of government. If the office of head of government is vacant, whether through censure or incapacity, the head of state could nominate a provisional head of government until a new election is called.

Another issue in the second model is who should have the power to dissolve Parliament: the head of state or the head of government? Where the head of government enjoys the power to dissolve Parliament, the next issue is whether his power should be permissive or mandatory upon a request for

opposition leader Chirac as the Prime Minister. Howard LaFranchi, *French Socialists Write Off Mitterand*, *CHRISTIAN SCI. MON.*, Nov. 20, 1992, at 7.

censure. In any event, where the head of government enjoys the power to dissolve Parliament, he should resign and submit to re-election.

The advantage of the second model is that Argentine society would perceive it as a less drastic change, especially if the head of government assumes the title of president of the government. The electorate would continue to elect the president, although it would learn that the president is more closely tied to Parliament. Furthermore, a new figure, the head of state, would begin to have weight as leader of the country's governing hierarchy.

Finally, a system of government is like a complex watch. Precise operation of one part of the watch depends on the proper functioning of another part. Unfortunately, space does not permit me to develop the context in which executive branch reform occurs. Such presidential reformation, however, obviously requires a contextual remodeling of other governmental branches, and highlights the innumerable questions that must be resolved to ensure the precise interworking of the branches. How should the legislature be organized? Should it be unicameral or bicameral? How should power be distributed and decentralized? What is the electoral regime? How should political parties be structured? What is the constitutional practice?

In conclusion, Argentina and other Latin American countries therefore need a more focused debate on the role and powers of their presidents. In debating this reworking, the countries of the region must draw on their own individual experiences to formulate mechanisms that best assure legitimacy, stability, and efficacy of government.